NOT TO BE PUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JAY DEL DRAHOTA, Defendant.	No. CR02-4090-DEO **REPORT AND RECOMMENDATION ON PRETRIAL MOTIONS**

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I. INTRODUCTION

The defendant Jay Del Drahota ("Drahota") was indicted by the grand jury on September 25, 2002, on one count of conspiracy to distribute methamphetamine. (Doc. No. 1) This matter is before the court on six pretrial motions filed by Drahota on November 25, 2002. After receiving an extension of time from the court, on January 3, 2003, the plaintiff (the "Government") filed a combined resistance to all of Drahota's motions (Doc. No. 38), and a separate brief in support of its resistance to each motion. Drahota's motions, and the Government's briefs in resistance, are docketed as follows:

1. Motion to suppress custodial interrogations of December 10, 1999, and January 11, 2000 (Doc. No. 21), with supporting brief (Doc. No. 22), and the Government's brief in resistance (Doc. No. 44).
2. Motion to dismiss the Indictment or, in the alternative, to suppress evidence (Doc. No. 23), with supporting brief (Doc. No. 24), and the Government's brief in resistance (Doc. No. 41).
3. Motion to suppress March 20, 2000, statement (Doc. No. 25), with supporting brief (Doc. No. 26), and the Government's brief in resistance (Doc. No. 42).
4. Motion for *Kastigar*[1] hearing (Doc. No. 27), with supporting brief (Doc. No. 28), and the Government's brief in resistance (Doc. No. 40).

[1] *Kastigar v. United States*, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972).

5. Motion to dismiss the Indictment based on prejudicial pre-Indictment delay (Doc. No. 29), with supporting brief (Doc. No. 30), and the Government's brief in resistance (Doc. No. 39).

6. Motion to suppress evidence obtained through illegal search and seizure on December 10, 1999, and January 11, 2000 (Doc. No. 31), with supporting brief (Doc. No. 32), and the Government's brief in resistance (Doc. No. 43).

In the Trial Scheduling and Management Order entered in this case on October 28, 2002 (Doc. No. 13), pretrial motions in this case were assigned to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended disposition. The court held a hearing on the motions beginning on February 5, 2003, and concluding on March 4, 2003. Assistant United States Attorney Kevin C. Fletcher appeared on behalf of the Government. Drahota appeared in person with his attorneys, Charles L. Hawkins and Robert L. Sikma.[2]

At the hearing, the Government offered the testimony of the following witnesses: Jack Bjornstad, former Assistant County Attorney for Dickinson County; Lakefield, Minnesota, Police Officer Jared Praska; Spirit Lake, Iowa, Police Chief John Mark Martyr; Spirit Lake, Iowa, Police Officer Rodney Bakker; Dickinson County Sheriff's Deputy Don Gude; Spirit Lake, Iowa, Police Officer Jeff Hanson; and Dickinson County Sheriff's Deputy Rex Ondler. The following exhibits were admitted into evidence: Gov't Ex. 1 (2 pages), a letter dated February 19, 2001, from Jack B. Bjornstad to Rex Ondler, with attached handwritten letter from Drahota to Mr. Bjornstad; Gov't Ex. 2, Lakefield Police Department Property and Inventory Report dated 12-11-99, signed by Drahota; Gov't Ex. 3, photocopy of two photographs of a two-way radio; Gov't Ex. 4, copy of an investigative

[2]The court permitted Mr. Sikma to leave immediately after making his appearance at the first hearing. He did not appear at the second hearing. Pursuant to Local Rule 83.2(i), attorneys appearing *pro hac vice* in criminal cases are not required to associate with local counsel.

report written by Deputy Ondler, ADMITTED UNDER SEAL for the limited purpose of placing certain matters into context; Gov't Ex. 5, certified copy of Waiver of Rights and Guilty Plea in *State of Iowa v. Drahota*, Crim. No. SRCRO 12597, Dickinson County District Court, signed by Drahota *pro se*; and Defense Ex. A (10 pages), copies of certain documents from the Dickinson County District Court file. Subsequent to the hearing, the Government provided a certified copy of the complete Dickinson County District Court file (36 pages), which the court hereby admits into evidence as Gov't Ex. 6. (The court has added handwritten page numbers to the exhibit for ease of reference.)

The court finds the motions have been fully submitted and are ready for consideration.

II. FACTUAL BACKGROUND

The events leading up to Drahota's arrest on the current charges began in early December 1999, with the arrest of another individual, Colin Hill, by Lakefield, Minnesota, Police Officer Jared Praska, as part of a methamphetamine investigation. Hill recently had been released from prison, and was arrested after fleeing from Officer Praska in a pickup truck. At the time of his arrest, Hill was in possession of a speed loader, with six rounds of .44 caliber ammunition, and drug paraphernalia. Hill identified Drahota as one of his sources, and agreed to cooperate with law enforcement by making a controlled purchase of an "eightball" of methamphetamine from Drahota.

On the evening of Friday, December 10, 1999, Officer Praska and Officer Trevor Anderson were waiting to meet with Hill at the Lakefield, Minnesota, police station, on Main Street in downtown Lakefield, to set up the controlled buy.[3] While they were waiting, they observed Drahota watching the police station. As they watched, Drahota walked by

[3]Hill was supposed to go to the police station to make the arrangements for the controlled buy, but never showed up.

the police station several times from different locations, and repeatedly drove past the police station in a vehicle with two other individuals.[4] The officers were concerned about the situation because they believed Hill was coming to the police station to cooperate against Drahota. They also were anxious because they believed Drahota might be acting in concert with Hill, and because of Hill's suspected involvement with firearms.

Lakefield is a town of about 1700 people. Its police force consisted of the Chief of Police, two full-time officers (Praska and Anderson), and a part-time officer. The Chief of Police was ill that evening, and the part-time officer apparently was unavailable, so Officers Praska and Anderson had no back-up. Because of their concerns, they put on Kevlar vests, and began to patrol the town together in a patrol car. They saw Drahota and his companions park their vehicle and walk away from it. Later, one of the individuals returned to the vehicle and drove it away. The officers stopped the vehicle for a traffic violation, but then released the driver. Later that evening, they saw the vehicle parked at Drahota's house.

As the officers patrolled Lakefield, they observed Drahota again walking toward the police station. Officer Praska told Drahota to stop watching the police station. Drahota started to walk away. While the officers turned their attention to a dog that had run into the street, Drahota turned around and walked back to the patrol car. Drahota then told the officers, "You don't want to be messing around with me. I know people." The officers took these remarks as a terroristic threat in violation of Minnesota law, so they handcuffed Drahota and searched him. In his pocket, they found a two-way radio that seemed to be rigged to have an "open" microphone. Officer Praska then walked Drahota to the police station, where he removed the handcuffs and allowed Drahota to attend to a runny nose.

[4] The officers recognized Drahota, but not the two other individuals.

Officer Praska asked Drahota why he was following the police and why he had made the threatening remark. Drahota responded that he was working with the Minnesota Bureau of Criminal Apprehension ("BCA"), and his house was being watched either by the BCA or federal officers. Officer Praska tried unsuccessfully to confirm this information. Drahota then began making general statements about drugs and Colin Hill. According to Officer Praska, Drahota made these statements voluntarily and not in response to any questions. At the time Drahota made these statements, he was not handcuffed and, according to Officer Praska, was free to leave. Eventually, Officer Praska actually told Drahota to leave, but Drahota remained and continued to make voluntary statements. Drahota's statements included comments that Hill was trying to buy drugs from Drahota, but Drahota did not have access to the quantities of drugs Hill wanted. Eventually, after about half an hour, Drahota left. The next day, the officers photographed the two-way radio and returned it to Drahota. (*See* Gov't Ex. 3)

About a month later, on January 11, 2000, officers of the Spirit Lake, Iowa, police department were conducting surveillance of Hill's residence in rural Dickinson County, Iowa. The officers had learned Hill had purchased precursors used in methamphetamine manufacturing at a local business, and they had other information indicating Hill was involved in manufacturing methamphetamine. They also believed he might be in possession of a .44 caliber handgun.

Spirit Lake Police Chief John Martyr was watching the Hill residence when he observed several people going between buildings on the property. He also observed three vehicles parked at the residence, and he saw someone back one of the vehicles, a white pickup truck, up next to one of the buildings. Martyr was concerned because law enforcement had information that Hill possibly was going to dismantle a methamphetamine lab and destroy evidence.

Officer Martyr then observed several people get into the three vehicles and drive away. The first vehicle to leave was a gray Pontiac LeMans, the second was the pickup truck, and the third vehicle was a gray Buick Park Avenue. Officer Martyr contacted other officers to pursue the vehicles and determine whether there was probable cause to stop them. The first officer to reach the three vehicles was Spirit Lake Police Officer Rodney Bakker. Officer Bakker reported the vehicles' speeds were picking up and he requested the assistance of other officers. Officer Bakker passed the pickup truck and the Buick, and pursued the Pontiac, which was the lead vehicle. As he passed the pickup truck and the Buick, he called in their license plate numbers. He then paced the Pontiac as traveling between 60 and 70 miles per hour in a 50-mile-per-hour zone. After a brief chase, Officer Bakker stopped the Pontiac. He identified its driver as Hill, and a passenger as Tonya Jones. Both Hill and Jones were placed under arrest.

Other officers proceeding to the scene heard Officer Bakker's radio check of the vehicles' license plates, and learned that both the pickup truck and the Buick had unregistered license plates. Officer Martyr, accompanied by Dickinson County Sheriff's Deputy Mike Workman, paced the pickup truck traveling at 65 miles per hour in a 55-mile-per-hour zone, and pulled it over.

Spirit Lake Police Officer Jeff Hanson pulled over the Buick. The driver of the vehicle, later identified as Drahota, started to get out, but Hanson told him to remain in the vehicle, and Drahota complied. Hanson testified he believed the suspects might be armed, and the windows on the Buick were heavily tinted, preventing him from seeing how many occupants were in the vehicle. He decided to wait for backup before approaching the vehicle. A short time later, Dickinson County Sheriff's Deputy Don Gude arrived at the scene. Officer Hanson adopted a defensive posture on the driver's side of the vehicle, with his weapon drawn, while Deputy Gude walked around to the passenger's side, also with his weapon drawn, to see if he could tell how many occupants were in the vehicle. Deputy

Gude saw only one person in the vehicle, so he holstered his weapon, walked back around to the driver's side of the vehicle, and told Drahota to get out of the vehicle. As Drahota got out of the vehicle, both Officer Hanson and Deputy Gude saw an open beer can inside the vehicle. Officer Hanson testified he also noticed a white substance around Drahota's nostrils.

The officers had Drahota lie on the ground, and then handcuffed him and patted him down. Officer Hanson then left the scene to assist the other officers, and Officer Kruger, from the Arnolds Park Police Department, pulled up and assisted Deputy Gude. Officer Kruger placed Drahota into the back seat of Deputy Gude's patrol vehicle while Deputy Gude searched the Buick. Inside the car, Deputy Gude found the open can of beer, an open half-gallon container of vodka, a bag containing syringes, and one round of .44 caliber ammunition.

Deputy Gude then drove Drahota to the Dickinson County Sheriff's office. As Deputy Gude was driving, he recited the *Miranda* warnings to Drahota, and Drahota indicated he understood his rights. Drahota was not questioned while he was being transported. At the Sheriff's office, Officer Hanson and Deputy Gude both observed the white residue around Drahota's left nostril. Deputy Gude testified he is a drug recognition expert with training in observing whether someone is under the influence of alcohol or other chemical substances. Drahota did not appear to Deputy Gude to be intoxicated "by any means."[5]

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[5]Deputy Gude gave this testimony after being recalled by the Government. At the beginning of the hearing, counsel for Drahota invoked Federal Rule of Evidence 615 to exclude witnesses, and the court ordered witnesses to be excluded. Deputy Gude was allowed to remain in the courtroom after he testified. While Deputy Gude was in the courtroom, Officer Hanson testified, on cross-examination, that he had seen a white substance around Drahota's nostrils, he had seen the open container of beer inside the car, and he had probable cause to believe Drahota might be under the influence of alcohol or other drugs. He stated that when he saw Drahota at the law enforcement center prior to booking, Drahota "possibly" (continued…)

Drahota was not Mirandized again at the Sheriff's office. Before Drahota was booked, Officer Hanson had a brief conversation with him.[6] Drahota told Hanson that Hill knew the police were "onto him," and stated Hill was loading everything up to get out of the state. Drahota also stated Hill had given him some methamphetamine, and they had each done a line before leaving Hill's residence.

Drahota was charged in Dickinson County with misdemeanor possession of methamphetamine, based on the drug residue around his nostril and his statement that he had done a line of methamphetamine. (*See* Gov't Ex. 6, p. 2) He made an initial appearance on the charge the following morning, January 12, 2000. (*Id.*, p. 3) At the time of his initial appearance, the court asked Drahota if he wanted court-appointed counsel. Drahota declined, stating he wanted to hire his own attorney. A trial information formalizing the charge was filed in the Dickinson County, Iowa, District Court on January 24, 2000, and Drahota's arraignment was scheduled for February 14, 2000. (*Id.*, p. 5)

Drahota appeared in court on February 14, 2000, and signed a Written Arraignment and Plea of Not Guilty in the Court Clerk's office. (*See* Def. Ex. A, unnumbered p. 9, signed by Drahota on 02/14/00, and filed by the court on 02/18/00[7]) On the front of the form, in response to the query, "I am represented by the following attorney," the Court Clerk wrote "N/A," and filled in Drahota's address and phone number. Drahota testified

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[5](…continued)
appeared to be intoxicated or high. On redirect, Hanson testified that Drahota was coherent and responded appropriately to questions he was asked. Then Deputy Gude was recalled. The court permitted Deputy Gude to testify so the record in this case would be complete, but his testimony on recall arguably was tainted by his presence during Officer Hanson's testimony.

[6]Officer Hanson testified that Deputy Gude told him he had read Drahota his *Miranda* warnings.

[7]The copy of this document in Gov't Ex. 6 contains only the front page, and not the back page which contains the date and Drahota's signature.

he told the Court Clerk he was having trouble finding a lawyer, and he asked for more time. The court set Drahota's case for trial on March 14, 2000. (*Id.*)

From this point forward, the court has three sources of information relating to the progress of Drahota's case through the Dickinson County District Court: the hearing testimony of Assistant Dickinson County Attorney Jack Bjornstad, Drahota's hearing testimony, and Gov't Ex. 6, the official court file from the Dickinson County District Court. Bjornstad testified twice at the hearing on these pretrial motions, once in the Government's case in chief and once as a rebuttal witness. The court finds Bjornstad's testimony to be less than helpful. As discussed later in this opinion, when Bjornstad testified in the Government's case in chief, he evidenced little or no recollection of Drahota's case or his dealings with Drahota. Bjornstad's rebuttal testimony directly contradicted his earlier testimony, as well as the testimony of Dickinson County Sheriff's Deputy Don Gude. Except where otherwise noted, the following represents the court's specific findings of fact with regard to the procedural history of Drahota's case in Dickinson County.

Drahota appeared for his trial on March 14, 2000. He entered the courtroom and sat down to await the opening of court. While he was waiting, Bjornstad approached him, said the trial was going to be continued, and asked to speak with him privately. Drahota followed Bjornstad into the law library, where Bjornstad said, "Listen, we're not interested in you, we're only interested in Colin [Hill]. We would like you to cooperate with us. Whatever you say, we won't use it against you, and we won't prosecute you for any of your statements." Drahota told Bjornstad he would have to think it over. Bjornstad filled out a form to continue Drahota's trial to June 13, 2000, and scheduling a pretrial for June 5, 2000. Drahota signed the form in the law library. (*See* Gov't Ex. 6, p. 9) Drahota never saw a judge on March 14, 2000, and he was not present when the judge signed the order continuing his trial.

Before further proceedings occurred in Drahota's case in Dickinson County, law enforcement obtained additional evidence linking Colin Hill to drug activities. On March 13, 2000, officers of the Dickinson County Sheriff's Office executed two search warrants at separate locations in Dickinson County that were connected with Hill, and seized evidence of drug laboratories from both locations. About a week later, on March 20, 2000, just after 8:00 a.m., Bjornstad called Drahota at Drahota's home to ask if Drahota had decided whether he was willing to cooperate with law enforcement against Hill. Bjornstad said Hill was going to be prosecuted in federal court, and they would appreciate Drahota's cooperation. Drahota still expressed reluctance, and Bjornstad told him he had nothing to worry about because anything he told law enforcement could not be used against him. Bjornstad offered to dismiss Drahota's pending Dickinson County charge if he agreed to cooperate, and said he would try to help Drahota out with charges pending against him in Minnesota. Bjornstad emphasized they were not interested in prosecuting Drahota, and they only wanted to prosecute Hill. Based on Bjornstad's representations, Drahota agreed to talk with Dickinson County Sheriff's Deputy Rex Ondler.

There is conflicting evidence as to whether Bjornstad set up Drahota's meeting with Deputy Ondler, or Drahota contacted Deputy Ondler to set up the meeting, but in either event, a meeting was scheduled for later in the morning of March 20, 2000. At approximately 10:00 a.m., Drahota went to Bjornstad's office, and Bjornstad reiterated the promises he had made regarding Drahota's cooperation. In Deputy Ondler's hearing testimony, he stated Bjornstad had told him Drahota's Dickinson County charges would be dropped if Drahota cooperated, and Bjornstad was going to try to help Drahota with his pending charges in Minnesota, although Bjornstad did not say anything about not using Drahota's statements against him.

Beginning at 10:40 a.m. on March 20, 2000, Drahota met with Deputy Ondler and Officer Jeff Hanson in Deputy Ondler's office, which was located in the basement of the

same building where Bjornstad's office was located. At the beginning of the meeting, Deputy Ondler told Drahota he was free to leave at any time, the meeting was strictly voluntary, and if he preferred not to answer a question, just to say so. Deputy Ondler told Drahota he did not have the authority to make any deals regarding Drahota's statements. He also told Drahota that he would be writing a report of what happened at the meeting, and he would be sending a copy of the report to the United States Attorney's office. Drahota testified this did not concern him because Bjornstad had told him Hill was being prosecuted in federal court, and he already knew his information would be turned over to the federal authorities. He thought Deputy Ondler's statement about not being able to make any deals meant just that: he was a police officer and did not have the authority to make any deals. Drahota still believed nothing he said could be used against him based on his deal with Bjornstad.

According to Deputy Ondler and Officer Hanson, Drahota then gave detailed information about his drug use and drug dealings, and his involvement with and knowledge of Colin Hill's drug dealings. While providing this information, Drahota made some mention of Hill's use of guns. There is conflicting evidence in the record regarding how the interview ended. According to Deputy Ondler, Drahota said something like, "You probably want the guns," and asked, "What will you give me?" Deputy Ondler responded that he could not make any deals, and reiterated that his report would be turned over to the U.S. Attorney's office. He claims Drahota then said something about having a lawyer in Minnesota,[8] and the deputy ended the interview, telling Drahota he needed to talk to his lawyer and contact Bjornstad again if he wanted to cooperate further.

[8]Deputy Ondler recorded the lawyer's name as "Larry School." Drahota testified he has never been represented by Larry School, and his court-appointed attorney on the Minnesota charges was John Scholl from Worthington, Minnesota.

Drahota denies he ever made a statement like, "You probably want the guns," or asked what was in it for him. Rather, Drahota testified he told the officers he did not know where Colin Hill's guns were. He stated the officers then asked him if he had a lawyer, and he told them he was represented on his Minnesota charges by John Scholl. Drahota testified the officers then stopped the interview because "they were done." The officers told him he needed to talk to his attorney, and then get back to Bjornstad if he had further information to give them.

After he completed the interview with the officers, Drahota thought his cooperation was complete, unless he was required to testify, and his Dickinson County charges would be dismissed. As a result, he did not appear for the pretrial on those charges, which was scheduled for June 5, 2000. Dickinson County Attorney Edward Bjornstad appeared at the pretrial on behalf of the State of Iowa. Because neither Drahota nor anyone on his behalf appeared at the pretrial, the court issued a Bail Forfeiture Order, charged Drahota with failure to appear, and issued a warrant for Drahota's arrest. (*See* Gov't Ex. 6, pp. 10-12) The court subsequently issued a judgment against Drahota and his bonding company for the amount of Drahota's bail. (*Id.*, p. 13)

Drahota apparently learned of the outstanding warrant for his arrest, and he appeared before the Dickinson County District Court on July 21, 2000. He explained that his charges were to have been dismissed due to cooperation with law enforcement. The court recalled the warrant, rescinded Drahota's bail forfeiture and the judgment on bail, reinstated Drahota's previously-posted bail, and rescheduled a pretrial conference for July 31, 2000, and trial for August 8, 2000. (*Id.*, pp. 15-16)

There is nothing in the Dickinson County District Court file to indicate whether any pretrial conference took place on July 31, 2000. The next entry in the file is an order of August 8, 2000, which was to have been Drahota's trial date. In the order, the court directs

Drahota to "appear with counsel at 9:30 a.m. on the 23[rd] day of October, 2000, for the purpose of entering a plea of guilty." (*Id.*, p. 17)

Also without explanation, the next entry in the court file is an order entered October 12, 2000, returning Drahota's case to the trial docket for November 14, 2000, and scheduling a pretrial conference for November 6, 2000. (*Id.*, pp. 18-19) Jack Bjornstad appeared at the pretrial on behalf of the State of Iowa. Drahota did not appear, nor did anyone appear on his behalf. The court issued another Bail Forfeiture Order, charged Drahota with failure to appear, and issued a warrant for his arrest. (*Id.* pp. 20-21) On January 22, 2001, the court entered judgment on Drahota's bond. (*Id.*, p. 22)

On January 24, 2001, Drahota went into custody to begin serving his sentence on the Minnesota charges.[9] Because of the outstanding warrant from Dickinson County, a "hold" was placed on Drahota with the jail in Minnesota. The "hold" prevented Drahota from participating in work release. Drahota testified he had a three-month-old baby, and he wanted to get on work release as soon as possible so he could support his child. He also testified that because Bjornstad had already reneged on his promises to dismiss the Dickinson County charge and help him with the Minnesota charges, he was afraid that if he questioned Bjornstad's failure to keep his promises, Bjornstad would make trouble for him and would leave the "hold" in place, preventing him from participating in work release. Drahota therefore agreed to enter into a written Waiver of Rights and Guilty Plea.[10]

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[9]At the hearing on the pending motions in this court, Drahota's counsel represented that Drahota was in jail in Minnesota from January 24, 2001, to September 20, 2001.

[10]Neither Drahota nor Bjornstad testified as to how they arrived at the arrangement for Drahota to enter a written guilty plea to the Dickinson County charges. The Dickinson County District Court file contains a letter from Drahota to Judge Larson of that court, in which Drahota was inquiring as to why all the Dickinson County warrants for his arrest had not been withdrawn. In the letter, Drahota states, "I have a letter stating that my guilty plea in this matter will cause all warrants for my arrest in Iowa, specifically, Dickinson County, to be recalled. It is signed and dated by the Assistant County Attorney, (continued…)

Drahota signed the waiver and plea on February 14, 2001, indicating he was appearing *pro se*. (*Id.*, pp. 23-26) He sent the waiver and plea to Bjornstad with a letter, in which he stated as follows:

> Dear Jack,
>
> Thank you for proceeding swiftly and I think that this arrangement is beneficial to the both of us. I do wish se[n]tence imposed immediately. If the court would see fit for probation, could it please be transferred with my felony probation? Also this will take care of all warrants in Iowa. Please inform the jail here when you receive it so they can release the Dickinson County hold on me. In my appreciation for your dealing, I will testify against Mr. Hill if you would like. Either by signed statement or in person. Please respond at the same address.
>
> P.S. As for proof of my jail sentence being served, I have been in jail since Jan. 23 and my estimated release date is Sept. 20. If you need any documentation feel free to call the jailors or the jail administrator, Doug. Feel free to write me if there is [sic] any problems. Thank you.

(Gov't Ex. 1, p. 2) Bjornstad sent a copy of Drahota's letter to Deputy Ondler on February 19, 2001. In his cover letter, Bjornstad stated he was enclosing a letter from Drahota "on his plea of guilty to Dickinson County drug charges," and noted Drahota was "offering to testify against Colin Hill, either by signed statement or in person." (Gov't Ex. 1, p. 1)

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[10](…continued)
Jack Bjornstead [sic]." (Gov't Ex. 6, p. 34) On September 12, 2001, the Dickinson County District Court entered an order in Drahota's case providing, in part, "To avoid any confusion, the court hereby confirms and ORDERS that all Bail Forfeiture Orders in this matter are rescinded and that any warrants of arrest in this matter are cancelled." (*Id.*, p. 36)

Bjornstad testified he believed Drahota's reference to an "arrangement" was to Drahota's agreement to plead guilty to the Iowa charges. Bjornstad stated he forwarded the letter to Deputy Ondler because of Drahota's statements about cooperating against Hill.

Pursuant to Drahota's written guilty plea, the Dickinson County District Court entered judgment and sentenced Drahota, *in absentia*, on February 20, 2001. Drahota was sentenced to 30 days' imprisonment, and given credit for 30 days served in the Nobles County, Minnesota, Jail. He was assessed a fine and surcharge of $650.00, which was suspended; ordered to pay court costs of $65.00; and the outstanding warrant was withdrawn. (Gov't Ex. 6, pp. 27-31) Drahota apparently was released from custody in Minnesota on September 20, 2001. (*See id.*, p. 32)

The present case was commenced when an Indictment was returned by a United States Grand Jury in this district on September 25, 2002, charging Drahota with conspiracy to manufacture and distribute methamphetamine. (Doc. No. 1) A Superseding Indictment was returned by the Grand Jury on November 20, 2002, changing the time frame of the alleged conspiracy. (Doc. No. 18)

At the hearing on the pending motions, Deputy Ondler testified he provided information to the Grand Jury concerning Drahota that arose directly from Drahota's statement to him on March 20, 2000. Deputy Ondler stated that once he had obtained Drahota's statement, he then went about trying to prove the information Drahota had given him was true. He testified that in his ongoing investigation of Drahota, he continuously relied on Drahota's statement, including during his interviews of Colin Hill, Tonya Jones, and Leslie Anderson.

III. BJORNSTAD'S HEARING TESTIMONY

Before discussing Drahota's pending motions, the court finds it necessary to address the troubling hearing testimony of former Assistant Dickinson County Attorney Jack

Bjornstad. Bjornstad was the Government's first witness. On direct examination, he testified that he had been involved in prosecuting Drahota in Dickinson County. He had reviewed his file on Drahota's case in December 2002, but had not reviewed it since that time. He recalled that Drahota was charged with possession of a controlled substance. (Bjornstad Transcript dated February 5, 2003 ("Tr.") at 4, 7) He also recalled that Drahota "was on the trial list for quite some time as a pro se defendant." (Tr. at 6) He stated Drahota eventually pled guilty to the charge. (Tr. at 8)

Bjornstad recalled an occasion when he was returning from court, and Drahota approached him and asked to speak with him. They went into Bjornstad's office, and Drahota stated he was facing charges in Minnesota that could result in significant prison time. Bjornstad told Drahota he "would contact the county attorney in Minnesota . . . and inform[ ] them that we had charges here in Iowa." (Tr. at 6) He said Drahota already had a meeting scheduled to talk with Deputy Ondler, and he did not know how Drahota had made contact with Ondler to set up that meeting. (Tr. at 8) Bjornstad testified he had no discussion with Drahota about giving him immunity, either state or federal, and immunity never even came up in their conversation. (Tr. at 7, 9) Bjornstad stated he had no agreement with any federal authority to give a witness any kind of federal immunity. (Tr. at 9)

Bjornstad initially said Drahota never told him, either in writing or in person, that he was willing to testify against anyone. (Tr. at 8) Then he recalled that while Drahota was in jail in Minnesota, Drahota tried repeatedly to call him, but Bjornstad would not accept Drahota's calls. Drahota wrote him a letter, which Bjornstad stated was "unsolicited by me," in which Drahota offered to testify against Colin Hill. (Tr. 8-9) Bjornstad sent a copy of the letter to Deputy Ondler because of Drahota's statement in the letter that he was willing to testify against Colin Hill. (Tr. at 11-12, 31)

On cross-examination, Bjornstad stated Drahota's case was a long time ago, and the whole thing "absolutely" was difficult for him to recall. (Tr. at 15-16) He agreed he might or might not remember conversations he had had with Drahota. (Tr. at 16)

Bjornstad did not recall entering into an agreement with Drahota to dismiss the Dickinson County charges if Drahota cooperated against Colin Hill; however, he could not state such an agreement never took place. (Tr. at 14) He did not recall meeting with Drahota at a pretrial conference in mid-March 2000, but could not say the meeting did not take place. (Tr. at 16) He agreed it was possible, although not his usual practice, that he could have talked with Drahota during the pretrial about cooperating. (*Id.*) He did not recall calling Drahota on the telephone on the morning of March 20, 2000, to talk with him about meeting with law enforcement; however, he could not say the call was never made. (Tr. at 22) He did not recall Drahota coming to his office on March 20th to meet with law enforcement. (*Id.*) The following colloquy took place between defense counsel and Bjornstad during the hearing:

> Q Okay. Is it fair to say, sir, that you don't recall telling Mr. Drahota that you [would] dismiss[ ] the current charges or the case against him if he cooperated?
>
> A That's correct.
>
> Q But you're not saying it didn't happen, correct?
>
> A That's correct.
>
> Q And you don't recall telling Mr. Drahota that you would try and help him in his drug-related charge in Minnesota, correct? I mean, you don't recall that?
>
> A I don't recall that, no. What I do recall is saying –
>
> Q My question is do you recall talking to Mr. Drahota about that?
>
> A Then, no, I do not recall.

THE COURT: Well, again, I don't know whether you mean it didn't happen or you don't remember and it could have happened.

Q You're not saying it didn't happen; you are saying you just don't recall as you sit here today, correct?

A Could you repeat your original question, please.

Q Sure. As you sit there today, you do not have any recollection of speaking to Mr. Drahota about trying to help him out on his Minnesota charges on or about March 20th, 2000, if he would cooperate with law enforcement?

A No, I do not recall ever saying I would help him out with his Minnesota charges.

Q But you're not saying you didn't do it; you just don't recall doing it?

A Correct. I am – I do not recall that.

Q And, similarly, if you had talked to Mr. Drahota about not prosecuting him in exchange for his cooperation, you don't have a recollection of that either, correct?

A That's correct.

Q You're not saying that that conversation couldn't have happened, you're saying as you sit there today, going back to March of 2000, you just don't have a recollection of it?

A That's correct, based on my review of the file and my own recollection, I do not recall that.

Q It could have happened, [you] don't recall it?

A That's right.

Q Fair? And, similarly, you don't recall whether or not on March 20th in the morning you told Mr. Drahota on the telephone that if he came in and talked to law enforcement personnel in your office, that anything he said would never be used against him?

A No.

Q You don't recall that?

A No, I do not recall that.

Q But you're not saying it didn't happen, are you?

A No.

* * *

Q And as you sit there today, based upon checking your memory, you have got absolutely no recollection, notwithstanding reading Ondler's report of March 20th, of ever offering Mr. Drahota a cooperation agreement, correct?

A That's right.

Q Not saying it didn't happen, you're just saying as – you said I don't remember ever doing anything like that?

A That's right.

(Tr. at 23-25)

Bjornstad reiterated that he did not recall talking with Drahota about cooperating against Colin Hill. (Tr. at 26) He also stated he has "never had somebody come into [his] office to enter into a cooperation agreement." (Tr. at 28)

On redirect examination, Bjornstad expanded on his recollection of his conversation with Drahota that occurred in Bjornstad's office. He stated Drahota told him that he was facing additional charges in Minnesota. "He informed me they were serious charges, state charges in Minnesota, and he wanted to know if the charges could be resolved at the same time. I told him I would inquire into that for him. And to my recollection, that's the extent of our conversation." (Tr. at 33)

Bjornstad further testified that at the time Drahota's case was pending, he would handle, in a typical year, "1000 to 2000 indictable misdemeanors, everywhere from a serious misdemeanor to a felony," and he also was responsible for nearly a thousand cases on the juvenile docket, as well as several thousand simple misdemeanors. (R. 33-34)

At the close of Drahota's evidence in the hearing, the Government recall Bjornstad as a rebuttal witness. From his testimony, it appeared Bjornstad's memory had suddenly sharpened, and matters about which he had been equivocal during his initial testimony were now crystal clear. He began by testifying he did not recall approaching Drahota at the pretrial to ask him if he would cooperate, and he did not "believe that ever happened." (Bjornstad Transcript dated March 4, 2003 ("Tr2.") at 3) He similarly did not believe he ever called Drahota on the telephone. (Tr2. at 4) He then testified as follows:

> Q . . . At any time in March of 2000, did you tell the defendant that anything he told you, if he cooperated would not be used against him?
>
> A No, I never told him that.
>
> Q Did you ever tell the defendant he had nothing to worry about if he talked to law enforcement?
>
> A No, I never told him that.
>
> THE COURT: Well, did you tell him that if he talked to law enforcement, you would dismiss the state charge?
>
> THE WITNESS: No, I never told him that either.
>
> THE COURT: Did you tell him that if he talked to law enforcement about Mr. Hill, you would talk to Minnesota authorities about him?
>
> THE WITNESS: No. I did tell him that I would talk to Minnesota authorities about him, but I never conditioned it on anything to do with Mr. Hill. It was to try to resolve my criminal case.
>
> THE COURT: You know you are directly contradicting what your agent has just testified?
>
> THE WITNESS: That may be, but –
>
> THE COURT: He said that you told him that you made those promises to Mr. Drahota, the last two I just said.
>
> THE WITNESS: That may be, but –

> THE COURT: Why would your agent lie about that? Why would Deputy Ondler lie about that?
>
> THE WITNESS: I don't know what Deputy Ondler testified to.
>
> THE COURT: Deputy Ondler testified in this court, just a few minutes ago, that you called Deputy Ondler and told him that if Mr. Drahota gave him a statement about Mr. Hill, you would drop the charges you had against Mr. Drahota. Now why would Deputy Ondler lie about that?
>
> THE WITNESS: I don't know why Deputy Ondler would lie about that.
>
> THE COURT: I can't think of any reason either. This is troubling. This is very troubling, Mr. Bjornstad.

(Tr2. at 5-6)

Bjornstad went on to testify he "d[id] not recall" telling Drahota he would not be prosecuted if he cooperated with law enforcement, and did not "recall contacting Deputy Ondler with regard to Mr. Drahota at all." (Tr2. at 6-7) He did not recall setting up an interview between Drahota and Deputy Ondler, or telling Deputy Ondler that Drahota might be calling him. (Tr2. at 7)

On cross-examination, Drahota's counsel went through Bjornstad's prior testimony regarding these matters using the transcript from the prior hearing. (*See* Tr2. at 15) Bjornstad acknowledged that his recollection between February 5, 2003, and March 4, 2003, had not improved, and was "as bad today [on March 4, 2003] as it was back then [on February 5, 2003]." (Tr2. at 15-16)

As the court noted in its colloquy with Bjornstad during the hearing, his testimony that directly contradicted both his prior testimony and the testimony of Deputy Ondler is

troubling, at best.[11] The court finds Bjornstad's testimony at the March 4, 2003, hearing not to be credible, and discounts that testimony in its entirety for purposes of considering Drahota's motions.[12]

The court turns now to consideration of Drahota's motions.

IV. DISCUSSION

Based on the facts and procedural history of this case, Drahota has asserted six motions for relief. The court will address each motion separately.

A. Motion to Suppress Custodial Interrogations (Doc. No. 21)

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[11] As noted in the Preamble to the Iowa Code of Professional Responsibility:

> Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.
>
> . . .
>
> Each lawyer must find within the lawyer's own conscience the touchstone against which to test the extent to which actions should rise above minimum standards. But in the last analysis it is the desire for the respect and confidence of the members of the profession and of the society which the profession serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength, which permits of no compromise.

IOWA CODE ch. 602, App. 32.Preamble.

[12] Given that Bjornstad testified at the earlier hearing that he had little recollection of these events, and that Deputy Ondler testified Bjornstad told him about his agreement to dismiss Drahota's Dickinson County charge and help him with the Minnesota charges in return for his cooperation, the court is at a loss as to why the Assistant United States Attorney would recall Bjornstad on rebuttal to contradict his prior testimony.

In this motion, Drahota seeks to suppress all statements he made to Officer Praska at the Lakefield, Minnesota, police station on December 10, 1999; all statements he made to Officer Hanson, Deputy Gude, or other law enforcement personnel, on January 11, 2000; and all evidence derived from any of those statements. Drahota argues these statements were made without the benefit of *Miranda* warnings, and without the assistance or benefit of counsel, and therefore the statements should be suppressed.

The starting point for consideration of Drahota's motion is *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). In *Miranda*, the United States Supreme Court ruled that law enforcement officers must, prior to beginning any interrogation, inform a suspect in their custody of his right not to incriminate himself and his right to an attorney. *Miranda*, 384 U.S. at 444, 86 S. Ct. at 1612. An interrogation encompasses direct questioning as well as the functional equivalent of interrogation, as tested objectively; *i.e.*, "any words or actions on the part of the police (other than those normally attended to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 1689-90, 64 L. Ed. 2d 297 (1980); *accord United States v. Hatten*, 68 F.3d 257, 261 (8th Cir. 1995).

1. Statements made on December 10, 1999

In the present case, the Government concedes Drahota was in custody on December 10, 1999, when he was handcuffed, frisked, and walked to the Lakefield police station. (*See* Doc. No. 44, p. 6) However, the Government argues that once Drahota was inside the police station and his handcuffs were removed, he was no longer in custody, as he was free to leave. (*Id.*) Whether a suspect is in custody is a mixed question of law and fact which the courts resolve using a totality-of-circumstances approach. *United States v.*

Griffin, 922 F.2d 1343, 1347 (8th Cir. 1990) (citing *United States v. Carter*, 884 F.2d 368, 370 (8th Cir. 1989)).

The record is not clear as to the particular point in time when the officers told Drahota he could leave. Officer Praska testified Drahota's handcuffs were removed so he could tend to a runny nose. At the time, he was still sitting in the police station with the two officers. Until the officers actually told Drahota to leave some time later, he reasonably could have believed himself to be in custody. Accordingly, if the officers intended to question Drahota, they were required to advise him of his *Miranda* rights before doing so. The officers did not advise Drahota of his rights before asking him why he was watching the police station, and why he had made the threatening statement. According to the record, Drahota's only response to those questions was that he was working with the Minnesota Bureau of Criminal Apprehension, and his house was being watched either by the BCA or federal officers. Because these questions were asked and Drahota responded without the benefit of *Miranda* warnings, the court finds his response should be suppressed.

The same is not true, however, of Drahota's other statements on December 10, 1999. The uncontroverted testimony in the record indicates that after the officers tried unsuccessfully to confirm Drahota's story about working with the Minnesota BCA, Drahota continued to "ramble on," making voluntary statements that were not in response to any questioning. Even after the officers told Drahota he should leave the police station, Drahota continued to make voluntary statements. He approached the door to leave on a couple of occasions, but then came back in and made additional statements. The court finds these statements were not in response to any interrogation, custodial or otherwise, and they were freely and voluntarily made. Accordingly, Drahota's motion to suppress these statements should be denied. *See* 18 U.S.C. § 3501(d) ("Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any

person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.")

2. Statements made on January 11, 2000

Deputy Gude testified he advised Drahota of his *Miranda* rights in the patrol car on the way to the law enforcement center after Drahota's arrest on January 11, 2000. Drahota indicated he understood his rights. Although Officer Hanson thought there was a possibility Drahota could have been under the influence of alcohol or other drugs, both Deputy Gude and Officer Hanson agreed that Drahota was coherent and appropriate throughout the encounter.

Deputy Gude did not question Drahota at all on the way to the jail. After Drahota and Deputy Gude arrived at the jail, Officer Hanson arrived. Deputy Gude told Officer Hanson that he had already informed Drahota of his *Miranda* rights. Before Drahota was booked, Officer Hanson had a brief conversation with him. Drahota stated Hill knew "the cops were onto him," and he, Hill, and others were loading everything up to get out of the state. Drahota said Hill had given him some methamphetamine, and they each had done a line prior to leaving the residence.

The question, therefore, is whether Drahota waived his right to counsel when he made statements to Officer Hanson at the jail. In *United States v. Boyd*, 180 F.3d 967 (8th Cir. 1999), the Eighth Circuit Court of Appeals explained:

> "The determination of whether an accused has knowingly and voluntarily waived his *Miranda* rights depends on all the facts of each particular case." *Stumes v. Solem*, 752 F.2d 317, 320 (8th Cir. 1985). The circumstances include "the background, experience, and conduct of the accused." *Id.* The government has the burden of proving that the defendant "voluntarily and knowingly" waived his rights. *Id.*

Boyd, 180 F.3d at 977. *See United States v. Barahona*, 990 F.2d 412, 418 (8th Cir. 1993) (government bears burden of proving by preponderance of evidence that defendant knowingly, voluntarily, and intelligently waived his rights); *United States v. Caldwell*, 954 F.2d 496, 505 (8th Cir. 1992) (waiver of *Miranda* rights is determined under totality of the circumstances and entire course of police conduct) (citing *Oregon v. Elstad*, 470 U.S. 298, 318, 105 S. Ct. 1285, 1297, 84 L. Ed. 2d 222 (1985)).

In *United States v. Jones*, 23 F.3d 1307 (8th Cir. 1994), the court described the "two distinct dimensions" of the inquiry into the validity of a *Miranda* waiver:

> "First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."

Jones, 23 F.3d at 1313 (quoting *Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 1141, 89 L. Ed. 2d 410 (1986)); *see Caldwell*, 954 F.2d at 504.

> Only if the "totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Moran v. Burbine, 475 U.S. 412, 421, 106 S. Ct. 1135, 1141, 89 L. Ed. 2d 410 (1986) (quoting *Fare v. Michael C.*, 442 U.S. 707, 725, 99 S. Ct. 2560, 2571, 61 L. Ed. 2d 197 (1979)); *accord United States v. Turner*, 157 F.3d 552, 555 (8th Cir. 1998).

Applying these criteria to Drahota's statements, the totality of the circumstances indicates Drahota knowingly and voluntarily waived his *Miranda* rights in making statements to Officer Hanson. The statements were made after Drahota had been advised of his rights, and had indicated he understood his rights. He never asked for an attorney or indicated he did not want to answer questions. Officer Hanson's questions were asked a relatively short time after Drahota was advised of his rights, and there is nothing to indicate any time delay

was a factor precipitating Drahota's statements. *See* 18 U.S.C. § 3501(b).[13] There is no evidence of police coercion, and no evidence that law enforcement acted improperly in any way concerning Drahota's arrest or questioning.

Accordingly, Drahota's motion to suppress the January 11, 2000, statements should be denied.

B. Motion to Suppress Evidence Obtained Through Illegal Search and Seizure (Doc. No. 31)

In this motion, Drahota asks the court to suppress all physical evidence seized from Drahota, his automobile, his home, or his belongings, on December 10, 1999, and January 11, 2000, as well as all information flowing from such evidence.

Addressing the December 10, 1999, incident first, the court finds the officers had probable cause to arrest Drahota after he made statements that the officers reasonably

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[13]The "totality of the circumstances" includes the factors specifically enumerated in 18 U.S.C. § 3501(b), which provides:

> The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.
>
> The presence or absence of any of the above-mentioned factors to be taken into consideration by the court need not be conclusive on the issue of voluntariness of the confession.

See United States v. Makes Room, 49 F.3d 410, 414 (8th Cir. 1995); *see also United States v. Kime*, 99 F.3d 870, 880 (8th Cir. 1996).

construed as a threat to their safety. The only item seized from Drahota at that time was a two-way radio, which subsequently was returned to him. The record does not contain evidence that law enforcement obtained any information from the temporary seizure of the radio. Accordingly, Drahota's motion should be denied as to the December 10, 1999, incident.

Turning to the January 11, 2000, arrest, Drahota argues law enforcement did not have a reasonable, articulable suspicion of criminal activity sufficient to justify stopping his vehicle. As a result, he argues his arrest was illegal, and all evidence flowing from the arrest should be suppressed.

The evidence shows that before Officer Hanson pulled over Drahota's vehicle, he had received information that the vehicle was bearing an unregistered license plate. This information provided Officer Hanson with an objectively reasonable basis to believe a traffic violation had occurred, justifying a stop of the vehicle. *See Whren v. United States*, 517 U.S. 806, 810, 116 S. Ct. 1769, 1772, 135 L. Ed. 2d 89 (1996) ("As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred."); *United States v. Lyton*, 161 F.3d 1168, 1170 (8th Cir. 1998) ("Any traffic violation, even a minor one, gives an officer probable cause to stop the violator."); *United States v. Thomas*, 93 F.3d 479, 485 (8th Cir. 1996) ("Probable cause exists where an officer objectively has a reasonable basis for believing that the driver has breached a traffic law.").

Because Officer Hanson's stop of the vehicle was justified based solely on the traffic violation, the court does not even have to reach the issue of whether the officers had a reasonable, articulable suspicion that criminal activity was afoot to justify stopping Drahota's vehicle. Nevertheless, the court notes such a suspicion was present. Drahota's vehicle was seen parked at the site of a suspected methamphetamine laboratory, and drove

away in the company of two other vehicles, one of which fled from the officers, and both of which were paced at speeds in excess of posted speed limits.

There simply is nothing in the record to support Drahota's contention that his January 11, 2000, arrest was illegal. Once Drahota was arrested, the officers had the right to search the compartment of his vehicle incident to that arrest. *See New York v. Belton*, 453 U.S. 454, 460, 101 S. Ct. 2860, 2864, 69 L. Ed. 2d 768 (1981) (police may search passenger compartment of vehicle incident to lawful arrest, and "may also examine the contents of any containers found within the passenger compartment"). Therefore, Drahota's motion to suppress evidence from his January 11, 2000, arrest should be denied.

C. Motion to Dismiss Indictment Based on Prejudicial Pre-Indictment Delay (Doc. No. 29)

Drahota moves to dismiss the indictment because "the delay in this prosecution has resulted in the loss or destruction of evidence, including a tape recorded conversation with Lakefield Police on or about December 10, 1999." (Doc. No. 29, p. 1) Drahota has come forward with no evidence that his conversation with law enforcement officers on December 10, 1999, was tape recorded. Office Praska testified he did not record the conversation, and Drahota has offered no evidence that Officer Anderson or anyone else tape recorded the conversation.

Regarding a defendant's burden to prevail on this type of motion, the Eighth Circuit Court of Appeals has explained:

> The Fifth Amendment's due process clause prohibits unreasonable pre-indictment delay. *United States v. Sturdy*, 207 F.3d 448, 451-52 (8th Cir. 2000). To establish unreasonable pre-indictment delay, a defendant must show that the delay resulted in actual and substantial prejudice to his defense, and that the government intentionally delayed the indictment to gain a tactical advantage or to harass him. *Id.* at 452. To prove actual prejudice, the defendant must identify witnesses or

> documents lost during the period of delay, and not merely make speculative or conclusory claims of possible prejudice caused by the passage of time. *Id.* The defendant also has the burden of showing that the lost testimony or information was not available through other means. *Id.* If the defendant fails to establish actual prejudice, we need not assess the government's rationale for the delay. *Id.*

United States v. Sprouts, 282 F.3d 1037, 1041 (8th Cir. 2002).

Under this standard, Drahota has failed to meet his burden to show he has been prejudiced in any way by the time lapse between December 10, 1999, and the filing of the indictment in this case on September 25, 2002. Accordingly, this motion should be denied.

D. Motion to Suppress March 20, 2000 Statement (Doc. No. 25)

The most problematic issues in this case are those surrounding, and flowing from, Drahota's statement to law enforcement on March 20, 2000. Drahota advances three arguments in support of his motion. First, he claims his statement should be suppressed because it was made without the benefit of counsel. Second, he claims his statement was "not freely and voluntarily made" due to his state of mind. Third, he argues his statement was given pursuant to a cooperation agreement that included a grant of immunity from prosecution. (*See* Doc. No. 25) The court will address each of these arguments separately.

1. Absence of counsel

In his motion, Drahota claims his March 20th statement should be suppressed because it was "made without the assistance or benefit of counsel in violation of [his] Fifth Amendment and Sixth Amendment rights under the Constitution of the United States." (*Id.*, ¶ 1) Drahota does not provide supporting authorities or elaborate on this argument at all in his brief. From statements of his counsel and testimony at the hearing, it appears Drahota is claiming his rights were violated because Bjornstad, Officer Hanson, and Deputy Ondler

dealt with him without asking if he was represented by an attorney, advising him that he could/should have an attorney present during questioning, or otherwise ensuring he was represented by counsel during his interview.

Drahota testified he never intended to represent himself in connection with his Dickinson County charges. At his initial appearance, he asked for time to retain his own attorney. Because he had not yet retained an attorney at the time he signed the written arraignment form, the Clerk of Court wrote Drahota's address and telephone number in the space reserved for attorney information. Drahota testified he had intended to request court-appointed counsel at the March 14, 2000, hearing, but he never saw a judge that day because Bjornstad told him the trial was going to be continued, and then asked to speak with him in the library.

However, Drahota did not tell Bjornstad at any time that he wanted court-appointed counsel, nor did he ask to see a judge on March 14, 2000, for the purpose of requesting counsel.

The Sixth Amendment guarantees to every person accused of a crime the right to the "assistance of counsel." On the other hand, the amendment also guarantees to an accused the right of self-representation. *Faretta v. California*, 422 U.S. 806, 820, 95 S. Ct. 2525, 2533, 45 L. Ed. 2d 562 (1975). The Supreme Court has explained, "The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant -- not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment." *Id.* Thus, an accused must request that counsel be appointed to represent him; the court will not automatically appoint an attorney simply because an accused is appearing *pro se*. The court must, however, make an accused "aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what

he is doing and his choice is made with eyes open." *Id.*, 422 U.S. at 835, 95 S. Ct. at 2541 (internal quotation and citation omitted).

On the other hand,

> a specific warning on the record of the dangers and disadvantages of self-representation is not an absolute necessity in every case if the record shows that the defendant had this required knowledge from other sources. Importantly, "a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to chose self-representation."

Meyer v. Sargent, 854 F.2d 1110, 1114 (8th Cir. 1988) (quoting *Faretta*, 422 U.S. at 835, 95 S. Ct. at 2239). *Accord United States v. Kind*, 194 F.3d 900, 904 (8th Cir. 1999) ("When the district court has not specifically warned the defendant of the dangers and disadvantages of self-representation . . . 'we must review the entire record to determine if the defendant had the required knowledge from other sources.' *United States v. Yagow*, 953 F.2d 427, 431 (8th Cir.), *cert. denied*, 506 U.S. 833, 113 S. Ct. 103, 121 L. Ed. 2d 62 (1992).").

There is no record before the court of what happened at Drahota's initial appearance with regard to informing Drahota of the perils of going forward without representation. However, the evidence indicates Drahota was not, at that time, planning to appear *pro se*, but simply requested time to locate and hire an attorney rather than accepting representation by a public defender. The court, therefore, must determine whether Drahota waived the right to counsel by proceeding to engage in settlement negotiations with Bjornstad, and by giving a statement to law enforcement, in the absence of counsel.

Once an accused has invoked the right to counsel, law enforcement officers may not interrogate the defendant further in the absence of counsel, "'unless the accused himself initiates further communication, exchanges, or conversation with the police.'" *Holman v. Kemna*, 212 F.3d 413, 417 (8th Cir. 2000) (quoting *Edwards v. Arizona*, 451 U.S. 477, 484-

85, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981)). As the Eighth Circuit Court of Appeals noted in *Owens v. Bowersox*, 290 F.3d 960 (8th Cir. 2002),

> [O]nce a defendant invokes his or her right to counsel, the defendant's initiation of police interrogation is necessary but not sufficient to establish a waiver of that right. The ultimate question is whether the circumstances as a whole (including the initiation) indicate that the defendant voluntarily, knowingly, and intelligently waived his or her right to counsel.

Id., 290 F.3d at 964 (citations omitted). "Initiation by a defendant occurs when the defendant evinces 'a willingness and a desire for a generalized discussion about the investigation.'" *Holman*, 212 F.3d at 417 (quoting *Oregon v. Bradshaw*, 462 US. 1039, 1045-46, 103 S. Ct. 2830, 77 L. Ed. 2d 405 (1983)).

The determination of whether an accused has made a knowing and intelligent waiver of the right to counsel "depends upon the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused." *Oregon v. Bradshaw*, 462 U.S. 1039, 1046, 103 S. Ct. 2830, 2835, 77 L. Ed. 2d 405 (1983) (internal quotation marks and citations omitted).

In the present case, the court finds Drahota waived his right to counsel in making a statement to law enforcement on March 20, 2000, for two reasons. First, although Drahota advised the court at his initial appearance that he wanted to retain private counsel, and although he repeated that statement to the court clerk when he signed the written arraignment form, Drahota never retained private counsel, and he never advised anyone of his subjective intention to ask that counsel be appointed to represent him. He engaged in negotiations with Bjornstad prior to making his statement, and participated in the interview with the officers on March 20, 2000, without ever requesting that counsel be present. Although the evidence is unclear as to whether Drahota first contacted Bjornstad, or vice versa, there is nothing in the record to indicate Bjornstad either knew or should have known Drahota was not representing himself. Second, Drahota was facing charges in another

jurisdiction, and was represented by counsel in connection with those charges. He had also been arrested on prior occasions. Thus, Drahota was aware of his right to have an attorney present during questioning.

For these reasons, the court finds Drahota knowingly and intelligently waived his right to have an attorney present during the interview on March 20, 2000. Accordingly, his Sixth Amendment argument is without merit.

2. State of Mind

Drahota argues, in his motion, that his March 20, 2000, statement was "not freely and voluntarily made" due to his state of mind. To the extent this argument dovetails with Drahota's belief that his statements could not be used against him, the argument is discussed below. Otherwise, the record contains no evidence, and Drahota has offered no argument, that his "state of mind" contributed in any manner to his decision to make a statement to law enforcement. The court finds this argument to be without merit.

3. Cooperation agreement and immunity

The most serious issue in this case arises from Bjornstad's representation to Drahota that if he cooperated with law enforcement in providing information against Colin Hill, Drahota's statements could not be used against him.[14] The court finds Bjornstad's statements granted Drahota immunity from subsequent prosecution by the State of Iowa relating to information he provided to law enforcement. However, without an agency relationship with the United States, Bjornstad did not have the authority to grant Drahota immunity from federal prosecution. *See United States v. Glauning*, 211 F.3d 1085, 1087 (8th Cir. 2000) ("[S]tate and local government officials have no power to bind the federal

[14]The court has made a finding of fact previously in this opinion that Bjornstad did, in fact, make such a representation to Drahota.

government.") (citing *Hendrix v. Norris*, 81 F.3d 805, 807 (8th Cir. 1996)); *United States v. Lua*, 990 F. Supp. 704, 712-13 (N.D. Iowa 1998) (collecting cases).

This does not mean, however, that when state authorities make baseless promises to elicit incriminating statements, an accused has no remedy when those statements provide the basis for a subsequent federal prosecution. The real question here is whether Drahota's confession was voluntary. As the Eighth Circuit Court of Appeals observed in *United States v. Grant*, 622 F.2d 308 (8th Cir. 1990), the test for determining whether a confession is voluntary depends on "whether the confession was 'extracted by any sort of threats or violence, (or) obtained by any direct or implied promises, however slight, (or) by the exertion of any improper influence.'" *Id.*, 622 F.2d at 316 (quoting *Bram v. United States*, 168 U.S. 532, 542-43, 18 S. Ct. 183, 187, 42 L. Ed. 568 (1897)). The *Grant* court noted:

> [D]eterminations of voluntariness are based upon an assessment of all of the circumstances and factors surrounding the occurrence when the statement is made. *Schneckloth v. Bustamonte*, *supra*; *Haynes v. Washington*, 373 U.S. 503, 83 S. Ct. 1336, 10 L. Ed. 2d 513 (1963); *Culombe v. Connecticut*, 367 U.S. 568, 602, 81 S. Ct. 1860, 1879, 6 L. Ed. 2d 1037 (1961). This flexible standard allows for judicial determinations of voluntariness in myriad situations without such decision making being hampered by rigid and potentially artificial restraints. The "totality of the circumstances" inquiry requires the reviewing court to investigate and analyze "both the characteristics of the accused and the details of the interrogation." *Schneckloth v. Bustamonte*, *supra* 412 U.S. at 226, 93 S. Ct. at 2047, 36 L. Ed. 2d at 862. Based upon a complete review of all relevant considerations on the issue of voluntariness, the ultimate question must be answered of whether the statement was "the product of an essentially free and unconstrained choice" or the result of an overborne will. *Culombe v. Connecticut*, *supra*[,] 367 U.S. at 602, 81 S. Ct. at 1879, 6 L. Ed. 2d at 1057.

Grant, 622 F.2d at 316-17. *See United States v. Santos-Garcia*, 313 F.3d 1073, 1079 (8th Cir. 2002) ("To determine whether a confession is voluntary or the product of undue coercion, we look to the totality of the circumstances.")

"[T]here is nothing inherently wrong with efforts to create a favorable climate for confession," *United States v. LeBrun*, 306 F.3d 545, 555 (8th Cir. 2002), and even express or implied promises, such as a promise of leniency, will not necessarily render a confession involuntary, unless the promise "overcomes the defendant's free will and impairs his capacity for self determination." *Smith v. Bowersox*, 311 F.3d 915, 922 (8th Cir. 2002) (citing *Culombe v. Connecticut*, 367 U.S. 568, 576, 602, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1961); *United States v. Kilgore*, 58 F.3d 350, 353 (8th Cir. 1995)); *see Santos-Garcia*, *supra*, 313 F.3d at 1079 (citing *Wilson v. Lawrence County*, 260 F.3d 946, 953 (8th Cir. 2001)).

In the present case, Drahota was charged in Dickinson County with misdemeanor possession of methamphetamine, a relatively minor charge. There is no reasonable explanation for why Drahota would make a statement implicating himself in serious drug dealing activities in the absence of Bjornstad's assurances that his statements could not be used against him. *See Murphy v. Waterfront Commission*, 378 U.S. 52, 84 S. Ct. 1594, 12 L. Ed. 2d 678 (1964) (federal officials are forbidden access to statements made in exchange for a grant of state immunity.); *United States v. McDaniel*, 449 F.2d 832 (8th Cir. 1971). The court finds Bjornstad's promise of immunity was sufficient to overcome Drahota's capacity for self-determination. His confession was involuntary because it was based entirely upon Bjornstad's promises. As a result, the court respectfully recommends the March 20, 2000, statement be suppressed.

E. Motion for Kastigar Hearing (Doc. No. 27)

Drahota has moved for a hearing pursuant to *Kastigar v. United States*, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972), "to require that the Government show that its evidence against the Defendant is neither directly nor indirectly traceable to the Defendant's immunized statements to Dickinson County, Iowa law enforcement personnel." (Doc. No. 27)

In *Kastigar*, the Supreme Court held that when a person is granted immunity in order to compel his or her testimony, and the person subsequently is prosecuted, the government has an "affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Id.*, 406 U.S. at 460, 92 S. Ct. at 1665. As discussed above, Drahota was not granted this type of immunity from federal prosecution. However, the court's recommendation that Drahota's confession of March 20, 2000, be suppressed, coupled with Deputy Ondler's testimony that he relied continuously on Drahota's statement in his further investigation of Drahota, raises obvious questions as to what, if any, independent evidence exists to support the indictment against Drahota. Despite the fact that Drahota was not *compelled* by a grant of immunity to incriminate himself, the court finds the Fifth Amendment nevertheless provides him with the same type of protection that arises in the case of compelled testimony.

In such a case, "the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law." *Murphy*, 378 U.S. at 77-78, 84 S. Ct. at 1609, 12 L. Ed. 2d 678 (1964) The *Murphy* Court noted, in a footnote, "Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." *Murphy*, 378 U.S. at 79 n.18, 84 S. Ct. at 1609 n.18; *accord Kastigar, supra.*

Therefore, if the trial court rules Drahota's March 20, 2000, statement is inadmissible, then a *Kastigar* hearing would be necessary in order to determine whether sufficient untainted evidence exists to support the indictment against Drahota. *See Kastigar, supra*; *see also United States v. Garrett*, 797 F.2d 656 (8th Cir. 1986).

F. Motion to Dismiss Indictment or Suppress Evidence (Doc. No. 23)

Drahota has moved either to dismiss the indictment, or in the alternative for suppression of all evidence obtained directly or indirectly as a result of his March 20, 2002, statement. For the reasons discussed above, the court finds the motion should be granted as to suppression of all evidence flowing from Drahota's March 20, 2000, statement.

The court is unable to make a recommendation regarding Drahota's motion to dismiss the indictment until the trial court issues a final ruling on the admissibility of Drahota's March 20, 2000, statement to law enforcement. If the court suppresses that statement, then the court recommends Drahota's motion for a *Kastigar* hearing be granted, and this matter be referred back to the undersigned to conduct such a hearing and issue a further report and recommendation on Drahota's motion to dismiss the indictment.

IV. CONCLUSION

As discussed above, **IT IS RECOMMENDED**, unless any party files objections[15] to the Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this report and recommendation, as follows:

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[15]Objections must specify the parts of the report and recommendation to which objections are made. Objections also must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).

a) Drahota's motion (Doc. No. 21) to suppress statements made on December 10, 1999, and January 11, 2000, be denied;

b) Drahota's motion (Doc. No. 31) to suppress evidence seized on December 10, 1999, and January 11, 2000, and information flowing therefrom, be denied;

c) Drahota's motion (Doc. No. 29) to dismiss the indictment based on prejudicial pre-indictment delay be denied;

d) Drahota's motion (Doc. No. 25) to suppress his March 20, 2000, statement be granted;

e) Drahota's motion (Doc. No. 27) for *Kastigar* hearing be granted; and

f) Drahota's motion (Doc. No. 23) to dismiss the indictment or, alternatively, to suppress all evidence flowing from his March 20, 2000, statement be granted as to the suppression of the evidence, and reserved as to dismissal of the indictment pending the outcome of a *Kastigar* hearing.

IT IS SO ORDERED.

DATED this ____ day of March, 2003.

_____
PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT